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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,

Appellants,

VS.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS

This is an appeal from a decree of the United States District Court for the Northern District of Illinois [constituted as provided in the Urgent Deficiencies Act of October 22, 1913 (38 Stats. 219)], which dismissed a bill filed in behalf of nineteen railroads to set aside and enjoin certain orders of the Interstate Commerce Commission. The orders complained of successively reduced rates for the transportation of coke, coke breeze, coke dust and coke screenings from producing points in the Chattanooga, Tennessee, Birmingham, Alabama, and Wise County, Virginia, districts to destinations in the

states of Ohio, Indiana, Michigan and Illinois, collectively known and referred to in freight rate parlance as central freight association territory, and hereinafter referred to, for convenience, as central territory.

1. REFERENCE TO OFFICIAL REPORT OF OPINION OF LOWER COURT AND TO REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

There was no opinion by the lower court in this case, but it made twenty-three findings of fact and stated nine conclusions of law which appear at pages 161 to 168 of the printed record.

Two reports were made by the Commission in the proceedings before it, the case being entitled *Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory.* The first one, dated March 11, 1935, is reported at 208 I. C. C. 281, and was accompanied by an order, not officially reported. This report and order appear at pages 15 to 33, inclusive, of the printed record. By this order the appellants and their southern railroad connections were required to cancel, on or before May 1, 1935, certain schedules of rates which had been published and filed with the Commission for the purpose of making uniformly effective the mileage scale of coke rates from southern origins to central territory that had previously been prescribed by the Commission in *Investigation and Suspension Docket No. 3511, Coke Between Points in Central and Illinois Territories,* and cases related therewith, reported at 194 I. C. C. 640. There had also been prescribed in the same I. & S. 3511 proceedings a scale of coke rates for application between points in central territory, which basis was made effective throughout that territory almost immediately following the issuance of the Commission's report and orders therein. The latter decision and orders entered in connection therewith appear at pages 42 to

129, inclusive, of the printed record. The second report of the Commission in Investigation and Suspension Docket No. 3985, dated April 30, 1936, is reported at 215 I. C. C. 384, and was also accompanied by an order which is not officially reported. This report and order, appearing at pages 33 to 40 of the printed record, required establishment by these appellants and their connections of the third successively lower basis of rates on coke from southern points to central territory destinations. A dissenting opinion by Commissioner Meyer, was joined in by Chairman Mahaffie, and Commissioners Porter and Miller. (R. 37-38)

The Commission also entered an order, dated April 30, 1936, in a proceeding before it entitled *Investigation and Suspension Docket No. 4198, Coke from Southern Points to Central Territory.* This order is not officially reported, but it appears at pages 40 to 42 of the printed record. It suspended tariff schedules of appellants, which would have made effective the mileage scale of rates fixed in the Commission's order, dated March 11, 1935, in Investigation and Suspension Docket No. 3985.

2. STATEMENT OF THE CASE.

The proceedings before the Commission known as Investigation and Suspension Docket No. 3511 (194 I. C. C. 640), involved *inter alia* a complaint of the Citizens Gas Company of Indianapolis and others (Docket No. 23375, and Sub. No. 1 thereto), wherein it was alleged that the rates on coke accorded producers at the Birmingham, Ala., Chattanooga, Tenn., Harlan County, Ky., and Wise County, Va., districts to destinations in central territory were unduly preferential of the southern producers, and unduly prejudicial to the complainants, in violation of Section 3 of the Interstate Commerce Act. (U. S. C. A. Title 49, Section 3)

There was also embraced in those proceedings a complaint of the Alabama By-Products Corporation and others (Docket No. 22052) in which it was alleged that the rates on coke from the Birmingham, Ala., district to destinations in central territory were unreasonable and unduly prejudicial as compared with the rates accorded their competitors located at Chattanooga, Tenn., and at various producing points in central territory. The complainants in the cases referred to prayed that the Commission prescribe reasonable, nonprejudicial and nonpreferential rates to central territory destinations. Their complaints were consolidated with other coke rate cases pending before the Commission and were heard on a joint record before an examiner designated by the Commission.

In its decision in those proceedings the Commission included in its ultimate findings the following:

1. That the schedules under suspension in Investigation and Suspension Docket No. 3511 have not been justified.

2. That the interstate rates on coke, in carloads, between points in central territory and Illinois territory, assailed in Nos. 23173, 23173 (Sub. No. 1), 23375, 23375 (Sub. No. 1), and 23888 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in Appendix 8, Column 2, except that to destinations in Michigan Zone C the rates should be based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

3. That the rates on coke, in carloads, from Ashland, Ky., and Ironton and Portsmouth (New Boston), Ohio, to destinations in Wisconsin, except that portion in Illinois territory, Iowa, Missouri, Nebraska, South Dakota, and Minnesota, assailed in Nos. 23173 and 23173 (Sub. No. 1) were not un-

reasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, (*a*) to destinations in Zone 1 and extended Zone G in Wisconsin of western trunk-line territory as described in *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 200, 210, rates based on the distance scale set forth in Appendix 8, Column 3, and (*b*) to destinations west and south of Zone 1, rates based on that scale applied to the entire distance, plus the distance arbitraries set forth in Appendix 8, Column 4, for application to that part of the hauls west and south of Zone 1, which rates we find are, and will be, reasonable.

4. That the rates on coke, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan assailed in No. 22052 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

5. That in applying the scales herein found reasonable distances should be computed over the shortest possible routes via existing connections for the interchange of carload traffic without transfer of lading, and specific point-to-point rates should be published.

9-A. Our findings herein are not to be construed as precluding reasonable groupings.

It is also important to note in connection with the foregoing decision the following statement by the Commission (R. 88):

"The question of undue prejudice arises in connection with all of the complaints except no. 23160 (sub-no. 1). These allegations are rather general in nature and are supported in the main merely by a statement of the differences in the rates. Where the question was dealt with more in detail the proof

is at best indefinite, and in our opinion insufficient to support a finding of undue prejudice. *It is believed that the establishment of the rates hereinafter prescribed as maximum reasonable will remove any prejudice that may exist in the assailed rates.*" (Italics ours)

In conformity with the decision therein and the orders which accompanied it, these appellants, on March 15, 1934, by appropriate tariffs, made effective generally between points throughout their own (central) territory the scale of coke rates prescribed by the Commission. In doing so, they fully expected that like action would be taken by the southern railroads, who publish tariff schedules for account of the central territory lines and themselves, in connection with the joint through rates on coke from southern producing points to central territory destinations. The originating lines in the South, however, failed to establish generally the interterritorial basis fixed by the Commission, but instead made no changes in the rates save in those cases where the previously existing rates were higher than the level prescribed. The requests and demands of the appellants that interterritorial rates be placed at the prescribed maximum reasonable level as the Commission anticipated, and as appellants themselves had done in treating the rates within central territory, were entirely disregarded by their southern railroad connections and it became necessary, therefore, in order to give complete effect to the orders of the Commission in those proceedings, for these appellants to issue to the southern railroads limited concurrences, as provided for by the rules and regulations of the Commission, requiring that the coke rates prescribed by the Commission from origins in the South to central territory destinations be published and made uniformly effective from the coke manufacturing districts in Alabama, Tennessee and Vir-

ginia, in the same manner as coke rates between points in central territory, contemporaneously prescribed by the Commission in the same decision, had previously been made uniformly effective by the appellants. Pursuant to the terms of the concurrences mentioned, the southern lines, by appropriate tariffs, published the rates specified to become effective May 1, 1934, from Alabama and Tennessee origins, and on August 3, 1934, from Virginia origins.

Upon the request of the southern producers and the same southern railroads, however, the Commission, prior to the taking effect of the tariffs referred to, suspended the rates contained in those schedules for a period of six months, and entered upon an investigation of the rates in the proceeding designated as *Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory.* A hearing was held before an examiner of the Commission, and on March 11, 1935, the Commission entered its report (208 I. C. C. 281) and order, in which it found that the rates published at the instance of these appellants, in order to bring about the establishment of the rate basis prescribed by it in Investigation and Suspension Docket No. 3511, had not been justified, and ordered the suspended schedules cancelled without prejudice to the filing of a new and lower level of rates which were set forth in an appendix to the report therein. (R. 32)

The appellants thereupon issued to their southern railroad connections a new set of limited concurrences providing for the publication of rates on coke from southern origins to destinations in central territory on the basis set out in the said appendix to the report of the Commission, and the southern lines accordingly published rates conforming to those concurrences to take effect May 2, 1936. However, the southern shippers and origi-

nating railroads again importuned the Commission to suspend the new tariffs, as a result of which those schedules were suspended by an order of the Commission, dated April 30, 1936, in its Investigation and Suspension Docket No. 4198. (R. 40) The Commission, however, did not suspend the concurrences issued by appellants in furtherance of the rate basis that had been prescribed by the Commission on March 11, 1935, in Investigation and Suspension Docket No. 3985. On the same date (April 30, 1936) and *without further hearing or notice to appellants,* the Commission entered a second report (215 I. C. C. 384) and order in the last-named proceedings, in which it prescribed an entirely different and still lower level of rates from southern points to central territory destinations than in either of the two preceding decisions involving those rates (R. 33), and requiring appellants and their connections to publish such lower rates on or before August 13, 1936.

For convenience, we have reproduced below a statement of the successively lower rate scales, in cents per ton, for application from the southern producing points to destinations in central territory required by the Commission in the three reports and accompanying orders above referred to:

DISTANCE	I&S 3511 (194 ICC 640) June 30, 1933	I&S 3985 * (208 ICC 281) March 11, 1935	I&S 3985 (215 ICC 384) April 30, 1936
	(Cents)	(Cents)	(Cents)
160 miles and over 140	230	230*	215
180 miles and over 160	245	240	225
200 miles and over 180	260	250	235
220 miles and over 200	270	260	245
240 miles and over 220	280	275	255
260 miles and over 240	290	285	265
280 miles and over 260	305	295	275
300 miles and over 280	315	305	285
320 miles and over 300	325	315	295
340 miles and over 320	335	325	305
360 miles and over 340	345	335	315
380 miles and over 360	360	350	325
400 miles and over 380	370	360	335
425 miles and over 400	380	370	345
450 miles and over 425	390	380	355
475 miles and over 450	400	390	365
500 miles and over 475	415	400	375
530 miles and over 500	425	410	385
560 miles and over 530	435	425	395
590 miles and over 560	445	435	405
620 miles and over 590	455	445	415
650 miles and over 620	470	455	425
680 miles and over 650	480	465	435
710 miles and over 680	490	475	445
740 miles and over 710	500	485	455
770 miles and over 740	510	500	465
800 miles and over 770	520	510	475
830 miles and over 800	530	520	485
860 miles and over 830	540	530	495
890 miles and over 860	550	540	505
920 miles and over 890	560	550	515
950 miles and over 920	570	560	525
980 miles and over 950	580	575	535
1,010 miles and over 980	590	585	545
1,050 miles and over 1,010	605	595	555

* The basis fixed here was made on a system of arbitraries for the hauls in the South and the amounts shown are based on an approximation of 7 per cent in excess of the basis required in 215 I. C. C. 384.

3. PROCEEDINGS IN THE LOWER COURT.

The bill of complaint herein was filed on July 22, 1936, the suit being started pursuant to the provisions of the Urgent Deficiencies Appropriations Act of October 22, 1913 (U. S. C. A. Title 28, Sec. 170; pp. 652, 653, 656). The bill (R. 1), after setting out the facts, alleged that the orders of the Commission, with respect to rates for the transportation of coke from southern producing

points to destinations in central territory, were arbitrary, unreasonable and wholly beyond the lawful powers of the Commission. Answers were filed by the United States (R. 129) and the Interstate Commerce Commission (R. 131). The southern railroads (R. 141), the Alabama Iron & Steel Shippers' Conference (R. 144), the Interlake Iron Corporation (R. 146), and the Citizens Gas & Coke Utility, and others (R. 155), were permitted to intervene. The answers filed by defendants generally alleged the validity of the Commission's orders.

The hearing in the lower court was held on October 15, 1936, and at that time the entire record made before the Commission, in its Docket I. & S. 3985, was introduced in evidence as Exhibits 4 (R. 201) and 5 (R. 417). During presentation of oral argument in behalf of these appellants, the lower court expressed the desire that briefs be filed (R. 565-567), but at the close of arguments on the same day and without having made any examination whatever of the record made before the Commission, the Court announced its decision that appellant's bill would be dismissed for want of equity. (R. 613)

On this appeal, all of the oral evidence taken in the proceedings before the Commission has been reduced to narrative form (R. 201 *et seq.*), under a stipulation of the parties that such narrative is a true and correct statement in narrative form of the oral testimony introduced in those proceedings and that it sets forth in condensed form all oral testimony offered on the trial of the case which is essential to the decision of the questions presented by the appeal. All of the exhibits offered in the proceedings before the Commission, and which were included as a part of Exhibit 4 in the lower court, have been certified to this court as original exhibits (R. 194) and are on deposit with the clerk.

4. PROCEEDINGS IN THIS COURT.

In accordance with Rule 12 of the Rules of Practice of this Court, a statement of the grounds upon which the jurisdiction of this Court is invoked was filed by appellants. On January 17, 1938, this Court entered an order finding that probable jurisdiction had been shown.

SPECIFICATION OF ERRORS.

Appellants make the following specification of errors:

(1) The lower court erred in finding that the evidence supports the findings of the Commission, and that in making its order dated April 30, 1936, in Investigation and Suspension Docket No. 3985, the Commission did not exceed its authority, and that said findings support the conclusions and its order of April 30, 1936, prescribing maximum reasonable rates for the transportation in question.

(2) The lower court erred in finding that the Commission's conclusion that the rates prescribed in the order of April 30, 1936, for future application will be maximum reasonable rates, is supported by evidence.

(3) The lower court erred in finding that the Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers is supported by the evidence.

(4) The lower court erred in finding that the Commission properly gave consideration to the effect of rates upon the movement of traffic.

(5) The lower court erred in finding that the Commission's conclusion, without hearing or notice, that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application

from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either territory through which said interterritorial traffic passed.

(6) The lower court erred in finding that the Commission's order of April 30, 1936, in Investigation and Suspension Docket No. 3985 is valid.

(7) The lower court erred in finding that it was not required to pass upon the validity of the Commission's order of March 11, 1935.

(8) The lower court erred in finding that the order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.

(9) The lower court erred in finding that the bill of complaint herein should be dismissed for want of equity at plaintiffs' costs.

(10) The lower court erred in failing to find, as it should have done, that the orders of the Commission in Investigation and Suspension Docket No. 3985, dated March 11, 1935 and April 30, 1936, and the order in Investigation and Suspension Docket No. 4198, dated April 30, 1936, are arbitrary and unjust, are contrary to the evidence of record and without support of any substantial evidence properly before the said Commission in the proceedings in which they were made, and that said findings are against the indisputable character of, and the manifest weight of, the evidence.

(11) The lower court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and require plaintiffs to maintain rates which

are less than reasonable maximum rates, and that the action of the Commission in making them was therefore arbitrary, unjust and without lawful authority.

(12) The lower court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and order plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers located in the South and undue prejudice of the manufacturers and shippers located in the North, which these carriers by the provisions of Section 3 of the Interstate Commerce Act are forbidden to publish and maintain.

(13) The lower court erred in failing to find, as it should have done, that the said orders of the Commission arbitrarily required reductions in rates that had been published and made effective in purported compliance with the Commission's decision in Investigation and Suspension Docket No. 3511, notwithstanding that those rates were clearly not involved in Investigation and Suspension Docket No. 3985.

(14) The lower court erred in failing to find, as it should have done, that there has been no understanding or agreement between the central territory lines, on the one hand, and the southern carriers, on the other, as to the divisions to be received by either or both of them out of the rates fixed by the Commission in Investigation and Suspension Docket No. 3985.

(15) The lower court erred in failing to find, as it should have done, that the Commission's order of April 30, 1936, which prescribed and required petitioners to publish and maintain and charge the third successively lower basis of rates without having taken or heard any evidence or facts but made solely on petitions or pleadings, was arbitrary and unlawful and denied petitioners the hearing provided for by law.

(16) The lower court erred in failing to find, as it should have done, that the said orders of the Commission were not supported by basic findings that the rates prescribed were reasonable maxima.

(17) The lower court erred in failing to find, as it should have done, that the Commission is without lawful power or authority to compel petitioners to join the southern carriers in rates made lower than reasonable maxima, in order to enable southern producers of coke better to compete with producers in the North.

(18) The lower court erred in failing to find, as it should have done, that the said order of the Commission requiring petitioners to charge shippers in the North reasonable maximum rates and compelling petitioners to join the southern carriers in rates from the South to the North less than reasonable maxima, would require petitioners to engage in a prejudicial and preferential practice in violation of law.

(19) The lower court erred in failing to find, as it should have done, that the said orders of the Commission were beyond its lawful powers in that the rates therein prescribed were based on competitive conditions between shippers and railroads in the South on the one hand and shippers and railroads in the North on the other hand, and in utter disregard of transportation conditions.

(20) The lower court erred in failing to find, as it should have done, that transportation conditions applicable in connection with joint through rates on coke from the South to the North are more onerous than apply within the North, and that reasonable maximum rates on coke from the South to the North therefore must be higher than are applicable within the North.

(21) The lower court erred in failing to find, as it should have done, that the Commission arbitrarily dis-

regarded and rejected certain well-known and long-recognized standards for testing and prescribing reasonable maximum rates, and in fact tested and fixed the rates on coke from the South to the North by a standard or a basis contrary to those usually employed.

(22) The lower court erred in failing to find, as it should have done, that the Commission fixed rates on coke from the South to the North for the purpose of equalizing disadvantages of geographical location, opportunities or abilities, which is beyond the lawful powers of the Commission to do.

(23) The lower court erred in failing to find, as it should have done, that there was no substantial evidence before the Commission to support its conclusion that the prescribed rates are reasonable maximum rates.

(24) The lower court erred in failing to find, as it should have done, that the indisputable character of the evidence before the Commission establishes that rates fixed and ordered are less than reasonable maximum rates.

(25) The lower court erred in failing to find, as it should have done, that the rates applicable to the transportation of coke in the North are subnormal rates, as are the rates voluntarily maintained by the southern carriers within the South, and neither basis affords a lawful or proper criterion for fixing maximum reasonable rates from the South to the North.

(26) The lower court erred in failing to find, as it should have done, that there was no evidence to support the erroneous assumption by the Commission that the share of the petitioners out of the joint through rates prescribed would be equivalent to the earnings they would receive for the transportation of coke within their own territory for like distances at the same level of rates.

(27) The lower court erred in failing to find, as it should have done, that the action of the Commission in suspending in its Investigation and Suspension Docket No. 4198 the tariffs naming rates on coke from southern manufacturing points to destinations in central territory and not the concurrences of central territory carriers providing for rates on the maximum reasonable basis previously prescribed by the Commission created a conflict between tariffs and concurrences which deprived petitioners of their right to reasonable compensation based on the reasonable and remunerative joint through rates so prescribed by the Commission for which concurrences were in effect.

(28) The lower court erred in failing to issue the injunction prayed for in the petition herein.

SUMMARY OF ARGUMENT.

I.

The orders of the Commission requiring appellants to make drastic reductions in the level of joint through interterritorial coke rates generally from southern manufacturing points to destinations in Ohio, Michigan, Indiana and Illinois, were issued without a hearing, without notice to appellants, and without evidence, in violation of Section 15 (1) of the Interstate Commerce Act and the appellants' constitutional rights.

II.

The orders of the Commission requiring coke rate reductions are contrary to the manifest weight of the evidence and the indisputable character of the evidence. The southern interests conceded that transportation conditions warrant a higher level of rates interterritorially than applies between points in central territory. They do not contend and did not purport to show by their evidence that the rates contended for by appellants exceeded reasonable maxima. In the oral arguments presented by southern interests to the Commission, no one contended that those rates were unreasonably high, but their evidence and contentions were directly solely to the issue of undue prejudice and preference. The interterritorial coke rates from the South are materially lower than coke rates fixed by the Commission in other cases for application on lines of appellants and other railroads between points in the North.

III.

The orders of the Commission are void because not supported by substantial evidence. The record in this

case contains no evidence of probative value tending to prove unreasonableness in the rates on coke from the South to central territory destinations.

IV.

The Commission, in making its reduced rate orders involved herein, simply required appellants to join in the central territory basis of rates, and utterly disregarded the standards ordinarily employed in the determination of reasonableness or unreasonableness of rates.

V.

The orders of the Commission are not supported by necessary findings. There are no adequate or proper findings in the Commission's reports on which its orders herein could be said to have been based.

VI.

The orders of the Commission are void because they attempt to equalize geographical disadvantages, fortune and opportunities. The reports of the Commission plainly manifest a purpose and determination on the part of the Commission to set interterritorial rates from the South to central territory at the level prevailing in the latter territory, in utter disregard of the more unfavorable transportation conditions obtaining on such traffic, for the sole purpose of improving the marketability of southern coke in northern consuming areas.

VII.

Even if the Commission's orders rest only in part upon the exertion of a power not granted to the Commission by Congress, its orders are void.

ARGUMENT.

I.

THE ORDERS OF THE COMMISSION REQUIRING APPELLANTS TO REDUCE THE RATES ON COKE FROM SOUTHERN MANUFACTURING POINTS TO DESTINATIONS IN OHIO, MICHIGAN, INDIANA AND ILLINOIS WERE MADE WITHOUT NOTICE AND HEARING IN VIOLATION OF APPELLANTS' RIGHTS UNDER THE CONSTITUTION AND UNDER THE INTERSTATE COMMERCE ACT.

The bases of coke rates to be charged from southern origins to central territory, as well as within the latter, were fixed by the Commission after extended hearings and on a comprehensive record in I. & S. Docket 3511. (R. 42, *et seq.*) These appellants in good faith complied with that decision and orders entered in connection with it by promptly revising coke rates between points in central territory to the basis prescribed. At the same time they requested their southern railroad connections to take like action in respect of joint rates from southern producing points to central territory destinations. These requests were disregarded by the southern lines, which went no further than to make reductions in the joint rates in instances where they were higher than the basis prescribed by the Commission.

It accordingly became necessary for appellants to issue, under rules and regulations laid down by the Commission, new concurrences limiting their participation in joint through coke rates from the South to rates on the basis fixed by the Commission. This action of appellants forced the publication of tariffs containing the 3511 rates, but on the request of southern railroads and shippers those schedules were suspended in I. & S. Docket No. 3985. A hearing in the matter of the sus-

pended tariffs was held before an Examiner for the Commission, at which time the southern interests sought by their evidence to enlarge the scope of the proceeding by including rates which were then in effect on the I. & S. 3511 basis. Upon objection by these appellants that such other rates were not involved in the case, the Examiner stated (R. 226):

> "Irrespective of what the exhibit shows, the issues of course are limited to the schedules under suspension."

and counsel for the southern lines, who was examining the witness added (R. 226):

> "The proposal is limited to the points involved."

And again at page 228 of the record, the following colloquy appears:

> "Examiner McGrath: The essential or basic issues here are the lawfulness of the proposed rates, isn't that correct?
>
> Mr. Day: That is right, the suspended rates.
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> Mr. Clark: The suspended rates.
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> Examiner McGrath: Yes, the suspended rates."

This general understanding and agreement of the parties as to the scope of the issues and the rates involved is likewise indicated elsewhere in the record. (R. 230, 231, 232, 235) The report and order of the Commission, following the hearing in those suspension proceedings, found the suspended rates not justified, and required that the schedules be canceled, without prejudice to the filing of rates on a basis suggested by the Commission. To the extent that the question of notice and hearing is concerned, this order was unquestionably within the right and power of the Commission. But on April 30, 1936, without any hearing beyond that just mentioned, and without its jurisdiction to pass on other rates having been invoked, the Commission entered an order requiring reductions in every coke rate from the southern man-

ufacturing points to every destination in central territory. This order was entered in this same proceeding—I. & S. Docket No. 3985—the issues in which were limited strictly by the order of investigation (and by the understanding of the parties at the hearing) to the lawfulness of the rates under suspension therein, rates applying to only a limited number of points in central territory. In this order of April 30th the Commission recited that on April 15, 1936, it had "reopened the proceeding for further consideration on the present record * * *," *i.e.*, the record made in response to the limited issue raised by the order of investigation, the record upon which the parties and the Commission's examiner announced their understanding and agreement that only this limited issue was involved.

The constitutional guaranty of due process of law requires notice and hearing as a condition to the validity of an order such as that entered here. *C. M. St. P. & P. R. Co.* v. *Minnesota,* 134 U. S. 418; *Southern R. Co.* v. *Virginia ex rel. Shirley,* 290 U. S. 190. Complementary to this constitutional right are the provisions of the Interstate Commerce Act. Thus, the portion of the Act dealing with the suspension of tariffs (Section 15(7)) provides:

> "Whenever there shall be filed with the Commission any schedule stating a new * * * rate, * * * the commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing, * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *."

Similarly, the section of the Act which gives the Commission its power to prescribe rates, Section 15(1), provides:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * demanded, charged, or collected * * * is or will be unjust or unreasonable or unjustly discriminatory * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *."

In *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this court declared (p. 91):

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence.'"

And again at page 91:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with facts proved."

In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, this court stated (p. 262):

> "* * * But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under sections 1(5), 3(1) and 15(1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, *a fair hearing is a fundamental requirement. Interstate Commerce Commission* v. *L. & N. R. R. Co.,* 227 U. S. 88, 91. * * *" (Italics ours.)

In the *New England Divisions Case* (*Akron, C. & Y. Ry. Co.* v. *United States,* 261 U. S. 183), this court said (at p. 200):

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

In the proceeding out of which the orders here sought to be enjoined issued, the "step asked to be taken" was that the Commission condemn as unlawful the tariffs under suspension. There was no issue with regard to rates to any points other than those named in the sus-

pended schedules, and there was no issue with regard to the prescription of any rates by the Commission to any points, in the event that the Commission found the rates in the suspended schedules to be unlawful. At the hearing in the lower court it was suggested that appellants were put on notice that the Commission might go beyond the issues raised by the order of investigation, and as understood at the hearing, by the petitions filed by the southern interests in opposition to the first order entered by the Commission in this docket, namely, the order of March 11, 1935. These petitions appear at pages 512 and 538 of the record. Not only do they fail to ask the Commission to prescribe any rates or deal with rates to any points not involved in the suspended schedules but, indeed, even if they did, they could not cure the defect of which complaint is here made since they would have dealt with matters of which notice was not given at the time of the hearing. The Commission's order of April 30, 1936, therefore, transgressed appellants' right to notice and hearing in two respects: (1) In condemning rates to points not involved in the suspended schedules and in requiring that they be reduced, and (2) in affirmatively prescribing for future application rates to any points, including those involved in the suspended schedules. It is respectfully submitted that for these reasons the order of April 30, 1936, contravenes the requirements of due process of law and the statutory provisions granting appellants the right to a full hearing, and that it should therefore be set aside.

II.

THE ORDERS OF THE COMMISSION REDUCING COKE RATES FROM THE SOUTH ARE CONTRARY TO THE MANIFEST WEIGHT AND THE INDISPUTABLE CHARACTER OF THE EVIDENCE.

In the proceedings before the lower court, counsel for the southern producers contended that the court was

without jurisdiction to set aside orders of the Commission even though such orders were against the manifest weight of the evidence. We believe, however, that appellants' charge that the order is against the weight of the evidence and the indisputable character of the evidence finds legal support in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91; *Louisville & Nashville R. R. Co.* v. *United States*, 246 U. S. 246, and many other decisions of this Court.

It is well to bear in mind at the outset that the interterritorial coke rates contended for by these appellants are none other than those which the Commission itself had prescribed a short time previously in the I. & S. Docket 3511 proceedings after extended hearings and the consideration of an enormous amount of testimony and documentary evidence as well as contentions and arguments of railroad and shipping interests, both north and south. Efforts subsequently made by southern shippers and railroads, through petitions to the Commission for rehearing and reconsideration, to secure modification of those prescribed rates were unavailing.

We have previously explained how the southern railroads, contrary to the expressed intention of the Commission and the action taken by appellants in respect of the coke rates within central territory and the practice usually followed in such cases, refused to publish on appellants' request the interterritorial (scale 3) basis prescribed by the Commission, but instead continued in effect certain rates which were lower than the scale, while at the same time reducing to the scale basis the great body of interterritorial rates which up to that time had, generally speaking, been maintained on a much higher level. This made it necessary, in the interest of giving complete effect to the decision and orders in I. & S. Docket 3511 proceedings, for appellants to issue limited concurrences to the southern originating lines, which had

for their object the uniform establishment of the interterritorial scale from southern coke manufacturing points to central territory, just as the maximum reasonable level of rates contemporaneously prescribed for application within that territory was being generally observed therein by these appellants.

Schedules naming rates on the I. & S. 3511 basis to those destinations in central territory where the rates were lower than the prescribed level were published pursuant to those concurrences but, at the request of southern shippers and railroads, were suspended by the Commission. This resulted in the continuation of lower rates between certain points than between others, as well as numerous violations of the long and short haul provision of Section 4 of the Act. After a hearing and argument by both sides the Commission prescribed in its order in I. & S. Docket 3985, dated March 11, 1935 (R. 32-33), an entirely new and lower scale of rates for interterritorial application and in its said order (R. 33) provided as follows:

> "It is further ordered, that the orders heretofore entered in *Investigation and Suspension Docket 3511, Coke between Points in Central and Illinois Territories,* reported in 194 I. C. C. 641, and the complaint No. 22052, *Alabama By-Products Corp., et al.* v. *Louisville & Nashville Railroad Company, et al.,* consolidated with and disposed of in the report immediately before referred to, be, to the extent that they require establishment and maintenance of rates on coke, in carloads, from origins in Alabama to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan, which are higher than those approved in the report made part hereof for application from and to the same points, and they are hereby, vacated and set aside."

Thereafter, and without any further hearing or notice to appellants, the Commission in the same suspen-

sion proceedings (I. & S. 3985) made a report (R. 33) and order (R. 39) dated April 30, 1936, requiring further drastic reductions not only in the suspended rates but in all coke rates from southern points to central territory destinations.

The Commission's action in arbitrarily requiring reductions in rates not involved in the proceedings before it and without evidence is discussed under a separate heading. The point here is that the Commission's orders, even to the extent that they relate to rates covered by the I. & S. 3985 proceedings, were against the manifest weight and the indisputable character of the evidence. The reasons assigned by appellants in support of this ground of their appeal are:

(*a*) The basis of interterritorial coke rates contended for by appellants was that fixed by the Interstate Commerce Commission on a comprehensive record and at the same time as the basis applying within central territory was prescribed by the Commission.

(*b*) The abundant and uncontroverted evidence offered by central territory railroads and shippers before the Commission to prove that the I. & S. Docket 3511 basis they are contending for was not unreasonably high but actually lower than it might properly be. (R. 204, 338, 368, 390, 394)

(*c*) Coke rates of appellants and other railroads, prescribed by the Commission for application on their lines between points in the North (*Standard Gas Equipment Corp.* v. *Lehigh Valley R. Co.*, 160 I. C. C. 4; *Hudson Valley Coke & Products Co.* v. *N. Y. N. H. & H. R. R. Co.*, 129 I. C. C. 472; *Coke Producers Association of Connellsville* v. *B. & O. R. R. Co.*, 27 I. C. C. 125, and other cases) were shown to be materially higher than any of the three reduced coke rate scales ordered to be established from the South to destinations in central territory. (R. 52-53)

(*d*) Admissions of witnesses for the southern interests that the I. & S. 3511 rates were not in excess of reasonable maxima. (R. 244, 245, 279, 289, 335-6)

(*e*) At the oral argument before the Commission not a single advocate out of the four appearing for the southern shippers and railroads contended that the I. & S. Docket 3511 interterritorial rates were unreasonably high. (Exhibit 5, R. 414) The arguments of Mr. Gwathmey (R. 449) and Mr. Mohr (R. 456) for the southern railroads and Mr. Norman (R. 472) and Mr. Widell (R. 487) for southern coke shippers are set out on the indicated pages of the record.

(*f*) The petitions for modification of the Commission's order, filed by the southern shippers (R. 512-548) made no contention that the rates prescribed by the Commission were unreasonable, but on the contrary, in their "requested specific findings" therein, those interests expressly concede (R. 514, par. 2) that the evidence before the Commission did not warrant a finding that the rates required by the final order of the Commission were as high as reasonable maxima, and went on to say that higher rates should be established only if southern railroads elected to maintain the higher rates. (R. 514, pars. 3-4)

III.

THE ORDERS OF THE COMMISSION ARE VOID BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Without reference to the large body of rates not involved in the proceedings before it, which were required to be reduced along with those that had been under suspension and ordered cancelled by the first report and order of the Commission in I. & S. Docket 3985, and confining discussion under the present caption to the rates in issue in that case, appellants submit that there

was no evidence of a substantial nature, which tended even remotely to prove that the assailed rates were in excess of maximum reasonableness. In order to save further argument on the question, it is perhaps well to state here that appellants are not asking this Court to weigh the evidence, to inquire into the soundness of the reasoning by which its conclusions were reached, nor to substitute its judgment for that of the Commission, for appellants well understand that the courts will not undertake to deal with such matters. It is, however, well settled by the decisions of this Court that an order of the Commission, which is unsupported by evidence, is clearly invalid. *Interstate Commerce Commission* v. *U. P. R. R. Co.*, 222 U. S. 541; *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91, 92; *New England Divisions Case*, 261 U. S. 184, 203.

In *Florida East Coast Line* v. *United States*, 234 U. S. 167, at page 185, the court said:

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reexamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involved not an issue of fact, but one of law which it is the duty of the courts to examine and decide. (*Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227, U. S. 88, 91, 92, and cases cited.)

Statements made by representatives of southern railroads and shippers at the hearing, on oral argument, and in their petitions for modification of the Commission's first decision and order indicate those interests had no intention of attacking as unreasonable *per se* the basis of interterritorial rates prescribed by the Commission in I & S Docket 3511 and contended for by ap-

pellants. According to the witnesses for the southern producers their position was (R. 367)

> "that the suspended rates, if approved, would establish undue or unlawful prejudice against us to this territory. Our reasons for that contention is that the grade of the Column 2 scale itself is sufficiently high to justify its application from Birmingham."

We have previously adverted to testimony of southern rate experts in which it was conceded that interterritorial rates from the South should properly be higher than those applying within the North. What then are the facts from which the Commission was persuaded to condemn as unreasonable in two successive decisions the basis of rates to which it had previously, in I. & S. Docket 3511, required the interterritorial rates to be reduced? We have carefully canvassed the record and are unable to find any evidence of probative value upon which the Commission's decision and orders could be said to have been based. The second decision in I & S. 3985 makes no reference to any supporting evidence, even in respect of the rates that had been cancelled after suspension, as a result of its first report and order in that case. The decision itself indicates (R. 35) that commercial, and not traffic or transportation, conditions led the Commission to order a wholesale reduction in coke rates from the South, for it was there stated:

> "The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect."

Such evidence, as is described in the foregoing excerpt from the Commission's findings, might conceivably justify a finding of prejudice or preference under Section 3 of the Act, but it is difficult to see how it could have any weight in appraising the intrinsic reasonableness or unreasonableness of rates.

In the various cases which have come before this Court, involving the question of insufficiency of evidence to sustain reduced rate orders of the Commission, reference will usually be found to evidence of comparisons of rates on the same or similar commodities, between points in the same general territories, and where operating conditions are substantially similar. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 666; *State of Ohio* v. *United States,* 292 U. S. 498, 505; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500. See also *Mississippi Railroad Commission* v. *A. & V. Ry. Co.,* 89 I. C. C. 47, at page 61. As appellants have already explained, there was no claim or contention by the southern coke manufacturers or railroads that the I. & S. 3511 basis of interterritorial rates were higher than reasonable maxima, and hence their testimony and exhibits went rather to the question of the ability of southern coke shippers to sell in central territory as much coke tonnage as they thought they should. Some comparisons were made with rates and earnings on extremely light loading and wholly incomparable commodities, such as charcoal, limestone, etc., but the witnesses offering them made it plain by their testimony that traffic density and other conditions warrant higher interterritorial rates than apply within central territory, and that the comparisons referred to were offered to show that the central territory basis would not be too low to apply interterritorially, in other words, would not be lower presumably than minimum reasonable rates. Whatever finding the Commission

might have made, or conclusions it might have reached, with respect to the probative value of such evidence to support findings of minimum reasonableness, if that question had been the issue before it, the Commission's reports make no reference to them and it is fair to say that they were appraised as having no probative worth in determining maximum reasonable interterritorial rates. Appellants submit that there is no evidence of a substantial character, tending to prove that the basis of rates fixed by the Commission itself in I. & S. Docket 3511 exceeded reasonable maxima at the time its orders in I. & S. Docket 3985 were made.

In the dissenting opinion of Commissioner Meyer (which was joined in by Chairman Mahaffie and Commissioners Porter and Miller) to the second report of the Commission in I. & S. Docket 3985, it was said (R. 37-38):

> "The basis of rates now established herein as reasonable is the third successively lower basis of rates prescribed in this proceeding within the past three years. As I understand the case, the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the North in the sale and movement of coke to destinations in the North. While the rates now prescribed are termed maximum reasonable rates, as were those twice previously prescribed, they are in fact compelled subnormal competitive rates.
>
> Instead of testing the rates by the standards ordinarily employed, they are here tested solely by the level of the rates applicable within the North and the expressed desires of the southern producers and carriers for the same level of rates from the South to the North for competitive reasons. The logic of the report is that if the northern carriers should later voluntarily reduce the level of their rates within the North, such reduced level would

then be prescribed as the maximum reasonable basis from the South to the North if the southern producers and carriers so desired.

The right of carriers to voluntarily reduce their rates to meet competition is recognized. The southern lines are free to exercise this right by reducing their rates to the border of the two territories. I do not recognize a right in this Commission to require the northern lines to join in less than maximum reasonable rates for the sole purpose of enabling southern lines to better meet northern competition.

I am authorized to state that Chairman Mahaffie and Commissioners Porter and Miller join in this dissent."

The District Court was seemingly impressed by the fact that rates within the South were in some instances at a lower level than those which the Commission in I. & S. 3511 had prescribed for application within central territory. The record indicates, however, that coke rates between southern points are on no fixed or regular basis, and they have never been passed upon by the Commission. Witnesses for the southern interests say that they were originally made for competitive reasons the same as, or lower than, the rates on coal (R. 328, 274), that the coal rates in the South are highly competitive (R. 269), and that the matter of revising coke rates in the South has been under consideration for some time. (R. 273, 329)

In referring to the coke rates prevailing between points in the South, the Commission said at page 677 of its decision in I. & S. Docket 3511 (R. 87):

"The fact that the present untreated coke-rate structure in the South is lower than in central territory has no special significance in the determination of maximum reasonable interterritorial rates. The southern carriers indicated their intention to

revise these rates, which are lower in many instances than rates approved by us on coal. In our opinion, the scale shown in appendix 8, column 3, will provide maximum reasonable and non-prejudicial coke rates from the southern origins in issue to central territory."

To demonstrate the unreliability and impropriety of using such rates as the excuse for depressing the normal interterritorial level to central territory, we call attention to the following typical illustrations of southern rates drawn from exhibits of the southern lines, using for examples points falling within the 400-mile to 425-mile zone in the three reduced coke rate scales promulgated by the Commission for interterritorial application:

I. & S. 3511 (194 I. C. C. 640)	380 cents
I. & S. 3985 (208 I. C. C. 281)	370 "
I. & S. 3985 (215 I. C. C. 384)	345 "
Birmingham to Charlotte, N. C.	360 "
Chattanooga to High Point, N. C.	372 "
Birmingham to Orangeburg, S. C.	338 "
Chattanooga to Savannah, Ga.	*349 "
Birmingham to Baton Rouge, La.	327 "
Chattanooga to Tallahassee, Fla.	344 "
Birmingham to Lakeland, Ky.	293 "

Rates on a level higher than those instanced for shorter distances could be cited, and conversely, lower rates for greater mileages, but those mentioned will suffice to show the chaotic and anomalous condition of the southern rates, which the Commission, in its first decisions fixing interterritorial rates, properly held have "no special significance in the determination of maximum reasonable interterritorial rates."

It is well settled by decisions of this Court that these depressed coke rates in the South, which were estab-

* Behring Exhibit 3 shows 349 cents, Burke Exhibit 9 shows 339 cents.

lished and have since been maintained for competitive reasons, furnish no lawful standard by which to determine the reasonableness of other rates. Thus, in *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 99, it was said:

> "When first put in force they (the rates) were abnormally low because compelled by water competition, and therefore furnish no just standard of reasonableness."

and again, in *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1, 13, this Court said:

> "Of course, competition by rail as well as by water may compel such a reduction in rates as altogether to destroy their value for purposes of comparison."

In *Texas & Pacific Ry Co.* v. *United States*, 289 U. S. 627, 636, the Court said:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Comm'n* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 723-4; 168 I. C. C. 144, 172-3; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 564; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522.
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> The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n*, 162 I. C. C. 195."

but there is no provision of the statute which compels railroads, as involuntary partners in joint rates with lines in another part of the country, to concur in the establishment of less than maximum reasonable rates for no other reason than to improve the opportunity of

southern coke manufacturers to dispose of their products in the North.

In *Export and Import Rates To and From Southern Ports,* 205 I. C. C. 511, the Commission said (p. 554):

> "Our power to require the establishment and maintenance of joint rates is, in the absence of undue prejudice, limited to the requirement that maximum reasonable rates be established and maintained."

IV.

THE ORDERS OF THE COMMISSION ARE VOID BECAUSE BY THEM THE COMMISSION ATTEMPTS TO EQUALIZE GEOGRAPHICAL AND TRANSPORTATION DISADVANTAGES, FORTUNE, OPPORTUNITIES OR ABILITIES.

The reports of the Commission in I. & S. Docket 3511 (R. 42, *et seq.*) and in I. & S. Docket 3985 (R. 15, *et seq.* and 33, *et seq.*) evince clearly a desire on the part of the Commission to prescribe a basis of rates on coke from the South to central territory that will permit the southern manufacturers to market their product in that area, or as is stated in the opinion of the four dissenting Commissioners (R. 38):

> "the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the North in the sale and movement of coke to destinations in the North. While the rates now prescribed are termed maximum reasonable rates, as were those twice previously prescribed, they are in fact compelled subnormal competitive rates."

In disregarding the geographical and transportation disadvantages of the southern coke producers, in order to place them on an equality with coke manufacturers in a territory where traffic and transportation conditions are more favorable, thereby denying to the

latter the benefits of their geographical location, the Commission went far beyond any powers conferred on it by the statute.

In *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, this Court said at pages 637-638 of its opinion:

> "While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel. *Southern Pac. Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 433, 444; *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U. S. 42, 46; *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434, 445; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 524; *Atchison, T. & S. F. Ry.* v. *Interstate Commerce Comm'n,* 190 Fed. 591; *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462, 471."

The principle that the reasonableness of rates is to be determined by considerations of the service performed under them rather by extrinsic circumstances, finds full expression in the decision in *Southern Pacific Company* v. *I. C. C., supra* (219 U. S. 433). In that case the Commission had condemned as unreasonable a rate of $5.00 per ton on lumber from the Willamette Valley to San Francisco and, by its order, restored the rate of $3.10 per ton which, by voluntary action of the carriers, had been in effect for many years prior to the publication of the $5.00 rate. The $3.10 rate was originally established to enable shipments from the Willamette Valley

to compete with lumber shipped by water from points on the Columbia River and Puget Sound. In summarizing the contentions upon which the suit rested, this Court said at page 441:

> "It was alleged that the Commission, in setting aside the increased tariff rate of $5. and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered, but had proceeded upon the assumption that the power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers."
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> * * *
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> "In the argument at bar, the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts. *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Making these concessions, the proposition relied upon to secure re-

versal is that the court below should have set aside the order of the Commission because that order was in excess of the power conferred upon the Commission; and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered."

The Court's finding was that the Commission exceeded its powers. It said (p. 444):

> "* * * we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

And at 449:

> "While it is true that the opinion of the Commission may contain some sentences which, when seggregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered, as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right under the law, to protect the lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

It is submitted that since, as this Court held in the *Southern Pacific case,* the Commission is without power to compel railroads to maintain a low rate for the purpose of enabling shippers in one territory to meet the

competition of shippers who had the benefit of cheap water transportation, the Commission is without power to compel the central territory carriers, who maintain a uniform and reasonable maximum basis of rates between points in the territory they serve, to join with another set of railroads in a depressed and unreasonably low basis of rates from the South.

Another case in which the order of the Commission was stricken down because, in making it, the Commission exceeded its power by making competition control (this time the competition of foreign sellers) was *Atchison, Topeka & Santa Fe Ry. Co.* v. *Interstate Commerce Commission,* 190 Fed. 591 (1911), affirmed 231 U. S. 736. In that case an injunction was granted by the Commerce Court against the Commission's order reducing the all-rail rates on lemons from California to the east for the reason that the Commission had acted under a mistake of law and without the scope of its delegated authority in taking competition into consideration in fixing the all-rail rates. The Court said at page 592:

> "The first and decisive ground of attack is that the order 'is without the scope of the delegated authority under which it purports to have been made' (*I. C. C.* v. *Ill. Cent. R. R. Co.,* 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280), in this: that, while in form holding the $1.15 rate unreasonable and prescribing the $1 rate as reasonable, in substance the Commission did not determine the intrinsic reasonableness of either rate, but reduced the rate prescribed by the railroads in order that, and to a point at which, in its judgment, the California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible; in other words, that the Commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition."

And again at pages 594-595:

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.
>
> An examination of the report of the Commission, reproduced so far as it bears on the lemon rate, in its entirety, demonstrates that except for two brief paragraphs suggesting grounds for lowering the lemon while maintaining the orange rate, it deals entirely with matters tending to show the need in this industry of a high-protective tariff against Sicily and, not on traffic considerations, but to compensate for the tariff insufficiencies, a low transportation rate especially to eastern territory."

The principle was again set forth in *Idaho Power Co.* v. *Thompson,* 19 Fed. (2d) 547, (District Court Idaho, three judges; 1927) where the Court said (580):

> "The Legislature has declared that rates shall be reasonable, just and non-discriminative, and has clothed the Commission with full power to see that such policy is carried into effect. In determining whether a schedule conforms to these requirements, it must act upon the facts and be governed by considerations intrinsic to the service, and cannot act out of respect for public policies however wise they

> may seem to be, which the legislature has not prescribed. As in substance was said in *Southern Pacific Co.* v. *I. C. C.*, 219 U. S., 433, 31 Sup. Ct. 288, 55 L. Ed. 283, it is without authority to disapprove a rate intrinsically just and reasonable, and substitute another which in itself is, in a legal sense, unjust and unreasonable, merely because it would be a wise policy to do so, or because a utility has so conducted itself as to be estopped from being entitled to a reasonable compensation."

In appellants' view, it seems clear that the Commission's attempt to require them to join in rates for the purpose of placing southern manufacturers and railroads in a better position to meet competition constitutes the entire basis of its orders. But even though it be concluded that the orders, to the extent that they might refer to rates properly before the Commission, are based on matters in addition to the attempt to require reductions for the purpose of meeting competition, it is respectfully submitted that the orders would still have to be annulled because it is certain that they rest in part, at least, upon the exertion of this power.

In the case of *Anchor Coal Co.* v. *U. S.*, 25 Fed. (2d) 462 (1928), the decision of a three-judge court was reversed by this Court with directions to the lower court to dismiss the bill of complaint without costs because between the time of the decision and the time of appeal certain matters transpired which rendered the controversy moot (279 U. S. 812), the decision has been cited with apparent approval in several subsequent cases by the Supreme Court. Among others, *U. S.* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510 (1935); *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 638 (1933). In the *Anchor case, supra,* the plaintiff contended that an order of the Commission requiring the cancellation of certain reduced rates on coal constituted an attempt to equalize

commercial conditions as between the mining region from which the reduced rates were to apply and other less prosperous mining regions whose costs of production were greater. Judge Parker said (at 471):

> "Much has been said as to the binding effect of the order entered by the Commission, but the law with regard thereto is well settled. If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the Commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law. *Chicago, R. I. & Pac. Ry.* v. *U. S.*, 274 U. S. 29, 33, 47 S. Ct. 486, 71 L. Ed. 911; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463; *Western Paper Makers' Chem. Co.* v. *U. S.*, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action. *Southern Pacific Co.* v. *I. C. C.*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *I. C. C.* v. *Union Pacific Co.*, 22 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308; *U. S.* v. *N. Y. C. R. R.*, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470; *U. S.* v. *New River Co.*, 265 U. S. 533, 540, 44 S. Ct. 610, 68 L. Ed. 1165.
>
> "We think that the enforcement of the order here complained of should be enjoined: (1) Because the Commission exceeded its powers, in that its action was based, *in part, at least,* upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates; (2) because it proceeded upon an erroneous theory of law, in holding that the burden was upon the southern carriers to justify a reduction of rates by a comparison of the reduced rates with lower maximum rates prescribed

> for a competing field; and (3) because it proceeded upon an erroneous theory of law, in holding that the burden was upon the carriers here to justify the proposed reduction of rates under section 15(a)(2) of the Interstate Commerce Act, as added by section 422 of the Transportation Act of 1920 and the Hoch-Smith Resolution."

In *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274 (1924), this Court held that if an order of the Commission was predicated in part upon data taken from the Commission's files but not introduced in evidence the order must be set aside. At page 286 the Court said:

> "The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence * * *. The contention of the Commission is that 'no doubt it will be necessary to refer to the annual reports of all these carriers' its rules of practice permitted matter in the reports to be used as freely as if the data had been formally introduced in evidence."

The Court held against this contention of the Commission and concluded (290):

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

It will be noted that in the first of these cases, the *Anchor Coal Company case*, the Court held that even though the Commission's order was based only *in part* upon the assumption of a power which it did not have (the power to give operative effect to unequal industrial conditions in determining reasonable rates) the

order would have to be set aside and that in the second case the Supreme Court held that even though the order was based only "in part" upon evidence not before the Commission, such evidence "may have been an important factor in the conclusions reached by the Commission" and that therefore the order must be held void. In the instant case, we do not have to indulge in surmise to find out whether competition between shippers was an important factor in leading the Commission to its conclusions. It tells us definitely that it was. Discussion of competition and the ability of southern shippers to market their coke in the North, and then the Commission prescribes the very rates that were proposed by the southern producers, who admit that their request for a reduction is based upon competition with northern producers. It is submitted, therefore, that even if it were to be found that the orders do not rest wholly upon the assumption of power to require reductions to meet competition, since, beyond peradventure, they rest in part upon this factor they must be held void if the Court finds that the statute did not grant that power to the Commission.

V.

THE COMMISSION PROCEEDED UNDER ERRONEOUS CONSTRUCTIONS OF LAW AND MISAPPREHENSIONS IN RESPECT OF ITS POWERS, IN TESTING THE INTERTERRITORIAL RATES FROM THE SOUTH BY THE LEVEL OF RATES APPLICABLE WITHIN CENTRAL TERRITORY, INSTEAD OF EMPLOYING ORDINARY AND WELL-RECOGNIZED STANDARDS OF RATE DETERMINATION.

As previously stated, the basis of interterritorial rates fixed by the Commission in I. & S. Docket 3511, although constituting in the main a downward revision in previously existing rates, was accepted by appellants and is the basis that has been contended for by them

throughout these proceedings. The requests for rehearing or reconsideration filed by the southern interests in that case had been denied by the Commission. It will be noted from the lengthy decision therein that that case was decided on a comprehensive record, participated in by the various northern and southern railroad and commercial interests. In the reports and orders subsequently issued by the Commission in the I. & S. Docket 3985 proceedings, the sole ground for the reductions required was the level of rates prevailing between points in central territory, and it was to the central territory basis exactly that the Commission's final report and order required the interterritorial rates to be reduced. This departure from long and well-recognized standards of rate determination was wholly without legal sanction, and contrary to principles theretofore frequently enunciated by this Court and generally followed by the Commission.

The printed volumes of the Commission's reports are full of cases dealing with similar interterritorial rates between the North and South, and in them the Commission, in view of the more favorable traffic and transportation conditions in the former, had found that interterritorial rates should be higher than the basis which it had prescribed for application within the North. Thus, in *Blue Ridge Glass Corporation* v. *A. & B. R. R. Co.*, 201 I. C. C. 401, the Commission, citing earlier decisions to the same effect, said at pages 428-429 of its decision:

> "It is well recognized that transportation conditions as a whole are more favorable in official territory than the southern territory. For that reason higher rates may properly be maintained for interterritorial movements between the two territories than for local movements within official territory."

Moreover, it was this difference in conditions in the two territories which led the Commission to prescribe ma-

terially higher divisions for the southern than the northern roads out of the joint through fruit rates from the South to northern destinations. *Atlantic Coast Line R. R. Co.* v. *Arcade & Attica R. R. Corp.*, 194 I. C. C. 729; 198 I. C. C. 375, affirmed in *Baltimore & Ohio Railroad Co.* v. *United States*, 298 I. C. C. 349.

In *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, the Court at page 666:

> "* * * True, in both the original and supplemental opinions, it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under Sec. 1 (5) or Sec. 3 (1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution."

The Commission attempts to justify the prescription of the central territory basis from the South in its final report in I. & S. Docket 3985 by citing and comparing the traffic density of a single railroad in the South with that of lines north of the Ohio River. In this connection, it said (R. 36):

> "The revenue net tons per mile of road transported by the Cincinnati, New Orleans & Texas Pacific Railway Company, which terminates at Chattanooga and Cincinnati, exceeded that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk line, southwestern, and southern territories are excepted."

The record shows, however, that the southern line referred to handles only a negligible quantity of coke, aggregating only 2738 tons in a single year (R. 383), out of the hundreds of thousands of tons of coke shipped from southern origins. If examples of individual roads' densities in the two territories were to be compared, it could be demonstrated from figures of record that lines in central territory, such as the Pittsburgh & Lake Erie, which actually originates a substantial coke tonnage, have double the number of revenue net tons per mile of road cited by the Commission for the Cincinnati, New Orleans & Texas Pacific.

The Commission, in its second report in I. & S. Docket 3985, mistakenly assumed that the central territory lines have no interest in interterritorial rates provided that the level of such rates is no lower than that prevailing within their own territory. In this connection, the Commission said (R. 36):

> "If interterritorial rates higher than column 2 rates were warranted, as the central carriers contend, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers. The carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the column 2 rates."

Of course, a fallacy in the foregoing statement is that central carriers will obtain as much from a given haul under the prescribed interterritorial rates as they would for a comparable haul within their own territory. Nothing could be further from the fact. Practically every destination in central territory can be reached by a single line of railroad from any of the producing points, and the entire revenue from an intraterritorial movement would accrue to that line. In no instance can the

southern producer reach central territory markets over one line. At least two carriers must participate in the haul, so that the revenue must in all cases be divided between two or more railroads. But of vastly more consequence to appellants is the question of their divisions from the prescribed rates. The Commission takes for granted that interterritorial rates from the South will be divided just as appellants divide between themselves the revenue from coke traffic moving within their own territory, but the decisions of the Commission dealing with similar interterritorial rates and according southern lines as divisions a far greater proportion of such rates than was granted the northern lines are by no means reassuring. See *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349.

Subsequent to the issuance of the reports and orders in these cases, the Commission made an order in *Sugar from Gulf Coast Port Groups to Northern Points,* 220 I. C. C. 623, wherein, as in the case at bar, it required to be established on sugar from points in the South to northern destinations the same low level of rates as obtained within the North. In that case, as in the instant proceeding, it was shown that the rate basis contended for by the northern roads was higher than prevailed (p. 628) either within the North or the South. The Commission's report in that case further shows (pp. 630-631) that "southern carriers concede that neither the present nor the suspended rates are unreasonably high if the standard of maximum reasonableness is to be determined solely by operating conditions" just as they have conceded in the case at bar that the I. & S. 3511 rates do not exceed reasonable maxima. The Commission's finding in that case (p. 642 of its report), that in the light of existing transportation conditions, the record did not justify higher interterritorial rates than applied intraterritorially within the

territories, was appealed to the United States District Court for the Northern District of New York and was tried before a three-judge court, consisting of L. Hand, Circuit Judge, and Cooper and Coxe, District Judges. The Court, speaking through Circuit Judge Hand, in a well-considered opinion, set aside the reduced rate orders. (*Baltimore & Ohio R. R. Co.* v. *United States*, In Equity No. 3083, not yet reported.)

Bearing in mind that the rates here contended for by appellants are those fixed by the Commission itself in the I. & S. Docket 3511 proceedings after extended hearings and on a comprehensive record, and that by no proper test have those rates been shown to be unreasonable or improper, it is submitted that the action of the Commission, in requiring reductions in interterritorial rates to the prescribed central territory level, for no other reason than to enable southern manufacturers better to meet the competition of the northern producers, was unwarranted, arbitrary and capricious.

At the hearing in the lower court (R. 586-7, 589-590, 597-8) the southern interests suggested that the assailed orders might find support in the phrase of Section 15a (2) of the Interstate Commerce Act which provides that:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic * * *." *

Their argument is that if the rates within central territory are on a lower level than those from the South to central territory, the ability of southern shippers to meet

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* Paragraph 2 of Section 15a reads in its entirety as follows: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

the competition of northern producers in the central territory markets will be deterred, and therefore the movement of coke from the South will be restricted. (R. 589, 597) As is apparent from the Commission's report (R. 36) one of the two factors upon which the Commission relied in finally ordering that the rates from the South to the North should be on the same level as the rates within central territory and that they be reduced from the basis previously prescribed, was that in the prior report not enough weight was given to "the effect rates have on the interterritorial movement of the traffic."

That the southern interests' suggestion and the Commission's action finds no sanction in Section 15a(2) is, we submit, quite clear; first, because that section deals with reasonableness of rates and not with rate relations and; second, because Section 15a(2) is only intended to be used in broad revenue cases dealing with the entire body of rates of a large group of carriers or all the carriers of the country, and not with the rates of a limited number of carriers and on just one commodity. These two points will be discussed in the order named.

By its very terms Section 15a(2) relates to the Commission's power to prescribe "just and reasonable rates." It does not purport to deal with relationships between rates. When it is asserted that, if the rates from the South to central territory were higher than the rates within central territory the movement from the South to destinations in central territory would diminish because the central territory producers would get the markets because of their lower level of rates, it is clear that it would not be any intrinsic quality of the rates from the South to the North that could be said to diminish the movement, but that it is the relation of the rates from the South to the North with those within central territory. Indeed, if the rates within central territory

were to be reduced to one-half of their present level without any change in the prescribed rates from the South to central territory, unquestionably there would be an adverse effect on the movement from the South to central territory because the southern producers would be handicapped in their competition with the central territory producers. Yet it could not be said that the rates from the South to the North were unreasonable. All the facts concerning the reasonableness of these rates would have been the same as when the Commission prescribed them. The only change would have been the reduction in the competitors' rates. Section 15a(2) dealing, as it does, only with reasonableness, contemplates that there shall be nothing in the rates themselves that unduly restricts movement—that they shall not be intrinsically so high that the traffic cannot reasonably be expected to bear them. If it were to be construed to mean that reductions might be made in order to allow a shipper to better his position in a market to which another shipper has lower rates, it would empower the Commission to parcel out markets to various shippers and to equalize geographical locations and other natural advantages. By the admission of its own decisions and under the decisions of this Court the Commission has no such power. *Chamber of Commerce of New York* v. *N. Y. C. & H. R. R. R. Co.*, 24 I. C. C. 55, 70; *Eau Claire Board of Trade* v *C. M. St. P. & P. R. Co.*, 5 I. C. C 264, 293; *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 637; *Anchor Coal Co.* v. *United States*, 25 Fed. (2) 462.

The second reason in support of our assertion that Section 15a(2) cannot properly be relied upon to support the assailed orders is that that section is intended to be used in broad revenue cases and not in a case like the present one. This may be demonstrated by recalling the background of the section. As it now stands, Section 15a(2) was enacted in 1933 (48 Stat. 220). It replaced

the provisions which had been enacted as part of the Transportation Act of 1920 and which directed the Commission "in the exercise of its powers to prescribe just and reasonable rates" to adjust rates so that the carriers as a whole or in rate groups might earn a fair return on a fair value and to consider, in determining what was a fair percentage of return, "the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." One of the most important provisions of the old Section 15a was the so-called recapture clause under which the carriers earning in excess of the percentage of return fixed as fair, were required to turn the excess over to a Government contingent fund (41 Stat. 488).

In *United States* v. *Louisiana,* 290 U. S. 70, this court said at page 75 that the "broad purpose" of the old Section 15a was "to maintain an efficient transportation system by enabling the carriers to earn a fair return." And at page 76 of that decision the court said that "the subject matter to which the section is to be applied" is "the production of increased revenue by a nationwide or group increase of rates * * *." At page 79 the court indicated that a proceeding involving "only one railroad and one commodity * * * was not the general revenue proceeding authorized by Section 15a."

It is quite clear, therefore, that the statutory predecessor of the present Section 15a(2) was not one that could be employed in a case like the present one.† That Section 15a(2) as it now stands is also properly to be employed only in the general revenue cases is clear from the circumstances of the change in the statute as well as from subsequent decisions.

† To the same effect is *Eastern Class Rate Investigation,* 164 I. C. C. 314, 389.

In the 1931 report of the Interstate Commerce Commission to Congress * the Commission discussed the old Section 15a(2) in detail and recommended to Congress that it be repealed. The following year in its report for 1932 ** the Commission recommended (page 100):

> "That for section 15a of the interstate commerce act a new section be substituted which will eliminate the present recapture provisions, both for the future and retroactively, and which will provide a new rule of rate regulation for that now contained in paragraph (2), such new rule to make it clear *that in regulating the general level* of rates, fares, and charges the commission shall, among other things, be guided by the need for producing, as far as possible, revenues which will be sufficient for the maintenance of an adequate national railway transportation system, and also to recognize the principle that the railroads may justly earn a surplus in times of prosperity as a safeguard against deficiencies in times of depression." (Italics inserted)

It is quite clear, therefore, that in asking for a change in this section, the Commission was simply asking Congress to change the rate-making rule of general revenue cases.

Subsequent to the change in 15a(2) this court indicated in *Florida* v. *United States*, 292 U. S. 1, that the new section, like the old, was to be applied in general revenue cases. At page 6 of that decision it is said:

> "The purpose of the changes in section 15a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of carriers and of revising the rule as to rate making. The requirement imposed by Transportation Act, 1920, for the adjustment of rates according to rate groups was

* Forty-fifth Annual Report of the Interstate Commerce Commission, 1931.

** Forty-sixth Annual Report of the Interstate Commerce Commission, 1932.

abolished and in substitution the Commission was directed to give due consideration to the factors which are specified in the section as amended. Thus the Commission is to consider, among other factors, 'the effect of rates on the movement of traffic;' 'the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service;' and 'the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'

Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13(4) intact."

The Commission indicated a similar view in *Gasoline From San Francisco Bay Points to Ogden, Utah*, 198 I. C. C. 683. At page 697 of that decision it said:

"The broad purpose of and the ultimate responsibilities imposed upon us by both the old and the new section 15a(2) are the same, namely, in prescribing rates to give 'due consideration * * * to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient man-

agement, to provide * * * adequate and efficient railway transportation service.'" (Omissions by the Commission.)

It would seem quite clear, therefore, that Section 15a(2) announces a rule of rate making to be employed in the general revenue cases and not in a case like the instant one where the rates on only one commodity and where a limited number of carriers are involved. It is pertinent to observe also that "the broad purpose" of the new section 15a(2) to provide the carriers with sufficient revenue to insure efficient national transportation would not be served by reducing the rates from the South to the North in order to cause more traffic to move on those rates by displacing the movement of a like amount of traffic from one point to another in central territory.

VI.

THE ORDERS OF THE COMMISSION ARE NOT SUPPORTED BY NECESSARY FINDINGS.

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499 (1935), the Supreme Court affirmed the decision of the District Court which set aside an order under which the Commission attempted to prohibit a railroad from reducing certain rates on coal on the ground that it "would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by Section 15a of the Act" and that therefore they would be "unreasonable and in violation of Section 1 (5) [which condemns unreasonable charges] and Section 15a (a) of the Act."

One of the grounds upon which the order was attacked was that it was not supported by the findings. The Supreme Court said (504):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasijurisdictional facts conditioning its power. *Florida* v. *United States,* 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119; *United States* v. *Baltimore & O. R. Co.,* January 7, 1935, 293 U. S. 454, *ante,* 587, 55 S. Ct. 268. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States,* 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119, *supra.* Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

And at 506:

> "The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States, supra* (282 U. S. 213, 75 L. Ed. 303, 51 S. Ct. 119); *Southern P. Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 449, 55 L. Ed. 283, 31 S. Ct. 298."

And it affirmed the decision of the lower court on the ground that the findings did not support the order.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United* States, 295 U. S. 193, this Court, in setting aside an order of the Commission for lack of proper findings, said (p. 201):

> "Its (the Commission's) report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambigous statements in the report intended to serve as findings may by construction be

given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States,* 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency can be supplied by implication. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 433. *See Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 86. *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320, 341."

In *Anchor Coal Co* v. *United States,* 25 Fed. (2d) 462, the District Court reviewed an order of the Commission in the so-called *Lake Cargo Coal Cases,* 139 I. C. C. 367 wherein the report had been amended to include a finding that the rates were "unjust and unreasonable" (25 Fed. (2d) 470). The Court said at page 464 of its decision in that case:

"To understand, however, exactly what the power is which the Commission has assumed to exercise it it necessary that we go behind its merely formal conclusions that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions. This it is our duty to do. *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *U. S.* v. *N. Y. Central Railroad,* 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470. And, in the performance of this duty, it is necessary that we analyze not only the report of the Commission accompanying the order whose enforcement we are asked to enjoin, but also the reports made in 1925 and 1927 with regard to the reductions of rates from the northern field, in the latter of which the differential was increased from 25 to 45 cents."

There are no findings in the reports of the Commission in I. & S. Docket 3985, which can be said to support the findings of unreasonableness in its decisions.

None of the statements made therein, even if taken at their face value, can be construed as indicating in any manner or degree that the basis of rates prescribed as reasonable maxima by the Commission in I. & S. Docket 3511 had become unreasonable in the period intervening between the decision in that case and those in the 3985 proceedings.

CONCLUSION.

Appellants submit that the orders of the Commission are unlawful and void and that the prayers of the petition for injunctive relief should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 638.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois.

APPELLANTS' REPLY BRIEF.

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